

**ENERGY MANAGEMENT SERVICES AGREEMENT**  
(Performance Contracting)

**BETWEEN**

\_\_\_\_\_  
(Municipality, School Department, etc.)

**AND**

\_\_\_\_\_  
(Energy Services Company)

DATE

*DOER will be updating these documents periodically. Please check back often for updates.*

Please Note: This document is a **model** Energy Services Agreement (ESA) with provisions that institutions **may or may not choose** to incorporate into their contracts with Energy Service Companies delivering Energy Management Services under Chapter 25A §11C or §11I of the Massachusetts General Laws. ***This Energy Management Services Agreement (EMSA) addresses general requirements only and does not comprise, used alone, a complete EMSA.***

It is the sole responsibility of each institution to consult with legal counsel in preparing both bid and contract documents and to ensure compliance with all applicable federal, state, and local law, rules, regulations, and procurement procedures. ***The Massachusetts Division of Energy Resources does not accept any responsibility for any party's use of this sample document, or assure the accuracy or legality of any provisions contained herein.***

For information on concepts and options for determining energy and water savings, please refer to the most recent version of the **Federal Energy Management Program M&V Guidance** found at [http://www1.eere.energy.gov/femp/financing/superespcs\\_mvresources.html](http://www1.eere.energy.gov/femp/financing/superespcs_mvresources.html).

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## Preamble

This Energy Services Agreement (hereinafter “Contract”) is made and entered into as of \_\_\_\_\_ (“Effective Date”) by and between \_\_\_\_\_ [insert name of Company] (hereinafter “ESCO”), a \_\_\_\_\_ based Corporation having its principal offices at \_\_\_\_\_, and \_\_\_\_\_ [insert name of Municipality, School Department, etc.] (hereinafter “the Customer”), through its [Municipal Agency (if appropriate)], having its principal offices at \_\_\_\_\_ (address), for the purpose of furnishing certain equipment and work specified herein (“Work”), and assuring the performance of said Work, designed to improve thermal efficiency, conserve energy, conserve water, reduce waste water, and, when specified, generate electrical power at Customer properties as listed in **Attachment 1** (hereinafter “the Premises”, which are more particularly described in **Attachment 1** attached hereto). This Contract is conditional upon the Customer obtaining financing from a regulated lender or municipal lessor in an amount not less than the Contract Price under such terms as are satisfactory to the Customer, provided Customer shall diligently pursue such financing and such terms are customary, reasonable and in compliance with pertinent laws and regulations.

## Definitions

Key terms used within this contract are defined as follows:

*Energy Baseline* – The energy baseline is a calculation or measure of each type of energy consumed in existing facilities, prior to the installation of energy conservation measures.

*Energy Conservation/Efficiency Measure (ECM or EEM)* — A set of activities designed to increase the energy efficiency of the facility. The installation of new equipment or modification or alteration to existing equipment to reduce energy costs by improving efficiency.

*Energy Savings* – The reduction of energy consumption or electrical demand resulting from the ESCO’s energy efficiency measures. Energy savings shall be determined by comparing the energy baseline with the energy consumed (or demand) after the ESCO has implemented energy conservation measures.

*Substantial Completion Date* – The date on which the ESCO warrants by written notice that the ECMs are substantially complete and producing savings equal to or greater than the guaranteed savings.

*Termination Value* – The amount the Customer pays to ESCO after the Substantial Completion Date to terminate this agreement.

## Contract Documents

It is understood and agreed that the following documents, attachments, and schedules and any amendments or addenda thereto, comprise this Agreement:

*List all attachments, schedules and documents, for example*

[Attachment 1: Description of the Premises](#)

[Attachment 2: Payment Schedule](#)

[Attachment 3: Certificates](#)

[Attachment 4: Technical Audit \(including revisions\)](#)

[Attachment 5: Equipment and Material Warranties](#)

[Attachment 6: Baseline Data and Projections](#)

[Attachment 7: Bonds](#)

## Representations and Warranties

Each party hereto represents and warrants to the other that (i) it has adequate power and authority to conduct its business as presently conducted or contemplated hereby to be conducted to enter into this Contract and to perform its obligations hereunder and that (ii) it possesses full authority to execute and deliver this Agreement and that it does not contravene any applicable law, rule or regulation.

## Price and Terms

### 4.1 Contract Price

As payment for ESCO's Work, Customer shall pay ESCO the sum of \_\_\_\_\_ dollars (\$ \_\_\_\_\_), ("Contract Price"). To the extent that materials and supplies are used or incorporated in the performance of Contract, ESCO is considered an exempt purchaser under the Massachusetts Sales Act, Chapter 14 of the Acts of 1966. ESCO shall be responsible for paying all other taxes and tariffs of any sort related to the Work.

### 4.02 Payment Terms

**Describe any agreed upon payment terms. [The following is only an example.](#)**

*Initial Payment:* Upon receiving funds from its lender or municipal lessor, an amount of \_\_\_\_\_ dollars (\$ \_\_\_\_\_) shall be paid for performance under the Technical Audit Agreement ("Agreement"), mobilization and other costs incurred prior to commencement of Work.

*Progress and Final Payments:* A Payment Schedule as proposed pursuant to the Agreement is attached hereto as **Attachment 2**. ESCO shall make best and reasonable efforts to comply with said schedule and shall periodically invoice on a progress basis all Work using the appropriate Application and Certification for Payment, Certificate of Substantial Completion or Certificate of Final Completion form attached as **Attachment 3**. Customer shall pay all amounts due upon receipt of such properly executed form.

### 4.3 Contract Termination

This Contract shall terminate \_\_\_\_\_ ( ) years after Final Completion unless otherwise agreed to in writing pursuant to this Contract.

## **The Work**

### 5.01 Time for Performance and Final Completion

ESCO shall commence Work within sixty (60) days of Customer sending the ESCO a Notice to Proceed, which Customer shall send upon closing financing. ESCO shall substantially complete Work within \_\_\_\_\_ ( ) days after commencing said Work. Extension of dates to commence or complete Work is at the sole discretion of the Customer. Approval for an extension of dates to commence or complete Work shall not be unreasonably withheld if the cause for an extension is pursuant to Sections 5.03, 5.06, 5.08, 5.12, 5.13, or 9.02.

### 5.02 Specifications of Work

ESCO's obligations hereunder are specified in **Attachment 4: Technical Audit** and related drawings and plans and any subsequent revisions thereto ("Technical Audit"), as approved by the Customer. Excluded from the Work are any modifications or alterations to the properties not expressly included within the Work. The requirements of all applicable laws, regulations and codes of federal, state, and local town or city government shall be met at all times. All Work shall be performed in a good and workmanlike manner.

### 5.03 Construction Procedures, Changes to Work and Coordination

ESCO shall supervise and direct the Work using its best ability, skill, attention, and oversight. ESCO, in consultation with Customer, shall be responsible for the construction means, methods, techniques, sequences, and procedures. The Customer shall review all proposed modifications to the building and systems and must approve of same prior to commencement of any work; such approval will not be unreasonably withheld. No change to the scope or specifications of Work shall be made without the written consent of the Customer, in the form of a revision to the Technical Audit. If ESCO fails to correct Work which is not in accordance with the specifications or persistently fails to meet specifications herein, Customer, by written order signed personally or by its authorized agent, may order ESCO to stop the Work, or any portion thereof, until the cause for such order has been eliminated.

ESCO shall perform the Work in such a manner as not to harm the structural integrity or operating systems of any building and shall repair and restore any damage caused by the Work at ESCO's expense.

ESCO shall not create or allow to continue any condition deemed to endanger health or safety as defined in Section 6.01 and if such a condition exists Customer shall have the right to exercise the remedies described therein.

A detailed operational plan showing the sequence of operations and a recycling and disposal plan which maximizes recycling shall be included in the Technical Audit (**Attachment 4**). Any changes to these plans are subject to the approval of the Customer.

ESCO shall supply to the Customer the telephone number of a responsible person who may be contacted during non-work hours for emergencies arising in connection with or effecting the Work.

ESCO shall coordinate any utility hookups provided by others under a separate agreement at no additional cost or expense to the Customer.

ESCO and its employees, subcontractors and agents shall not smoke within any building, including basements.

#### 5.04 Relationship with Maintenance Staff

ESCO shall cooperate with Customer's operating and maintenance personnel, train said personnel in operation and maintenance of any equipment installed as part of the Work, and coordinate the Work on a planned and programmed basis. ESCO shall deliver a preventive maintenance schedule and procedures for any equipment installed as part of the Work. No equipment shall be installed which will require additional personnel to be hired by the Customer for the operation or maintenance of said equipment.

#### 5.05 Material and Equipment Installed

The Customer shall make the final determination whether any material or equipment installed is as specified in ESCO's Response to the Request for Responses ("RFR"), which is incorporated in this Contract by Section 9.13 below, and the Technical Audit. No substitution of any material or equipment specified shall be made without the written consent of the Customer in the form of a revision to the Technical Audit, and any such substitution shall be at least equal in quality, finish, durability, serviceability and performance for the purpose intended.

ESCO shall install and, when applicable, operate and maintain, or, if specified in the Technical Audit, train Customer personnel to operate and maintain equipment in a manner that will provide standards of service to meet requirements of Section 5.02 and equipment manufacturers' literature, specifications and instructions.

ESCO shall prepare and furnish at least three (3) Maintenance Manuals that include product data and which are subject to acceptance by the Customer for all equipment installations at each property.

#### 5.06 Asbestos and Hazardous Materials

ESCO will be responsible for proper disposal of construction demolition debris and other solid or hazardous wastes. The ESCO will be responsible for proper disposal of all ballast's containing or suspected of containing PCBs and fluorescent lamps containing mercury. Disposal plans must be documented and appropriate transportation and disposal documents prepared before disposal commences and actual disposal must be documented immediately after disposal.

- 1) Hazardous waste can only be disposed of at a DEP/EPA licensed hazardous waste treatment, storage, and disposal facility.

- 2) "Special Waste"<sup>1</sup>, such as asbestos, can only be disposed of at a DEP and Town Board of Health licensed landfill or DEP/EPA licensed recycling facility which is permitted to receive the particular type of special waste involved. The license should reflect the types of wastes that can be received for disposal at the landfill. In the event that friable asbestos is encountered and must be disturbed during the course of this contract, the Customer's Director of Physical Plant or his designee shall be notified and work in the affected area shall cease until a remediation plan is agreed upon. This shall not affect the savings allocation, but an extension of the completion date may be granted equal to the time lost. Contractor shall have taken into account all available asbestos studies provided by the Customer during the audit phase of the project.
- 3) Demolition debris can only be disposed of at a DEP and Town Board of Health licensed municipal sanitary landfill or DEP/EPA licensed recycling facility. The landfill or recycling facility must be permitted to receive the type of waste involved.

#### 5.07 Subcontracting

ESCO may subcontract part of the Work to others provided any subcontractors are identified in ESCO's Response to the RFR or in the Technical Audit. ESCO may, with the written consent of the Customer in the form of a revision to the Technical Audit, substitute a subcontractor for one so identified or, if no subcontractor for a certain trade or task has been so identified, engage one. ESCO shall be responsible for the conduct, acts and omissions, whether intentional or unintentional, of its subcontractors, employees, agents, invitees or suppliers. Nothing in this Contract shall create any contractual relationship between any subcontractor, employee, agent, invitee or supplier and the Customer.

#### 5.08 Delays

If ESCO is delayed in the commencement or completion of any part of the Work due to events beyond ESCO's control and without the fault or negligence of the ESCO, including but not limited to fire, flood, extended labor disputes, unusual delays in deliveries, unavoidable casualties, abnormal adverse weather, war, and acts of God, or due to Customer's actions or failure to perform its obligations under this Contract or to cooperate with the ESCO in the timely completion of the Work, then ESCO will notify Customer in writing of the existence, extent of, and reasons for such delay. ESCO shall have no claim for additional compensation on account of such delays but ESCO and Customer may extend the contract time by revision to the Technical Audit for such reasonable time as they shall agree.

#### 5.09 Equipment Location and Access

Buildings will be occupied during construction. ESCO shall take all necessary precautions to ensure the public safety and convenience of the occupants during construction. The ESCO shall complete the Work in accordance with the schedule in Attachment 2. ESCO must use sufficient personnel and adequate equipment to complete the Work pursuant to Section 5.01. The Work must be completed in a continuous uninterrupted operation between the hours of 8:00 AM and 4:30 PM on

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<sup>1</sup> Asbestos, asbestos-containing material, formaldehyde, or other potentially toxic or otherwise hazardous material. Check Department of Environmental Protection for any updates on the definition of special waste.



Monday through Friday, unless otherwise authorized in writing by the Customer. No Work is to be done on holidays, Saturdays, or Sundays other than for emergencies.

The ESCO is responsible for the security of partially completed work and for materials or equipment stored at Customer properties. Only materials and equipment intended and necessary for immediate use shall be brought into the buildings. Equipment and unused materials shall be removed from each building by the end of each workday. The Customer shall provide if available, without charge, a mutually satisfactory location or locations for the storage and operation of materials and equipment and the performance of the Work, including a location for staging and mobilization.

Flammables and combustibles shall be stored only in accordance with Fire Prevention Regulations (527 CMR 1.00-50.00). In the event that the Customer is unable to provide a satisfactory location then ESCO shall provide and pay for suitable storage.

#### 5.10 Permits and Fees

ESCO shall secure and pay for building and other permits and governmental fees, licenses, and inspections necessary for proper performance and completion of the Work that are required by federal, state, or town or city governments. In the event that fees for any permits are reduced or waived by request, standing or intervention of the Customer, then, at the Customer's option, the amount of the savings of the fee shall be deducted from the line item in the Work budget and added to the contingency line item or the Contract Price reduced by that amount

#### 5.11 Utilities

The Customer shall provide and pay for water, heat, and utilities consumed by the ESCO during performance of the Work. The ESCO shall install and pay for any facilities or modifications not already in existence that are necessary to access such water, heat, and utilities during the Work.

#### 5.12 Concealed or Unknown Conditions

If ESCO finds conditions during the Work that are subsurface or otherwise concealed physical conditions that differ materially from those indicated on the drawings or are unknown physical conditions of an unusual nature that differ materially from those conditions ordinarily found to exist and generally recognized as inherent in similar construction activities, ESCO shall notify Customer of such conditions promptly, prior to significantly disturbing the same, and in no event later than one (1) business day after first observing the conditions. Such conditions may include, but are not limited to, water damage, termite damage, or structural building defects. If such conditions differ materially and cause an increase in the ESCOs' cost of, or time required for, performance of any part of the Work, the ESCO shall submit a written estimate of the material and labor cost increase and time delay. If the Customer concurs with the need, cost estimate, and time delay, Customer and ESCO shall make an equitable adjustment in the Contract Price or Time for Performance and Final Completion, or both. Pursuant to Section 5.08 above, ESCO shall not be entitled to damages for delay. In no event shall the Contract Price be increased by more than ten percent (10%).

### 5.13 Casualty, Condemnation, Damage

If any fire, flood, other casualty, or condemnation renders a portion of any property described in Attachment 1 unsuitable for habitation or destroys a substantial part of the area within which the Work is to be performed or which the Work affects, the Customer and ESCO may terminate or modify this Contract by mutual agreement. The Customer shall pay ESCO for all Work completed to the date of termination. If any materials or equipment are damaged by the negligence or willful misconduct of an employee, agent or invitee of Customer, Customer shall repair or replace said item within a reasonable period of time, or, adjust the Contract Price to pay for repair or replacement or adjust Time for Performance and Final Completion, or both.

### 5.14 Standards of Service and Comfort

The following facility performance requirements of service and comfort shall apply throughout the Agreement term:

Type of Service	Environmental Requirement
1) Heating	
1) Occupied	70° F
2) Unoccupied	55° F
3) Storage	55° F
2) Cooling	
1) Occupied	72-76° F
3) Hot Water Heaters	140° F.
4) Ventilation	within Code at all times
5) Lighting	
Lighting levels should be determined using the most current Illuminating Engineering Society guidelines. The following average maintained illuminating levels (at working height) shall be met:	
a) Interior Lighting (specify)	
b) Exterior Lighting (specify)	

If unable to meet these Standards of Comfort for any reason, the Customer and ESCO shall mutually agree upon an appropriate adjustment to energy savings.

### 5.15 Shutdown of Services

ESCO hereby acknowledges that continuous operation of services, including but not limited to heat, water, domestic hot water, electricity, gas, sanitary facilities, elevators, fire alarms or protections, and access to the property, or common areas is essential to the operation of the Customer's properties. If any such service, or access to the property, or any common area is to be discontinued for any period of time in order to perform the Work, ESCO shall give the Customer as much notice in writing as is practicable, but in no event less than seven (7) days in which event the Customer shall, by written

response, approve unconditionally or with conditions such shutdown of services. Such conditional approval may include a requirement for the ESCO to provide and pay for temporary services, may limit the time period for which services or access may be shut down, or may require other actions, accommodations or expenditures on the part of the ESCO. With respect to fire alarm or other fire protections, ESCO shall also notify the local fire department of any shutdown of service and notify the fire department when such service is restored.

The Customer acknowledges that such shutdowns may be necessary to perform the Work from time to time and will not unreasonably withhold approval. The Customer agrees to communicate with occupants on plans to shut down services or access and temporary measures, if any, which will be made.

#### 5.16 Indemnification and Limitation of Liability

ESCO shall be responsible for the Work and take all precautions for preventing injuries to persons and property in or about the Work and shall bear the costs of all losses or damages resulting from or on account of the Work. The ESCO shall pay or cause payment to be made for all labor performed or furnished and for all material used or employed in carrying out this Contract. ESCO shall assume the defense of, indemnify and hold harmless the Customer, their officers and agents from all claims relating to:

- 1) Labor performed or furnished and materials used or employed for the Work,
- 2) Inventions, patents and patent rights used in and in doing the Work,
- 3) Injuries to any person received or sustained by or from the ESCO and its employees, subcontractors and its employees, any agents, suppliers and invitees in doing the Work, or as a consequence of any improper materials, implements of labor used or employed therein, and
- 4) Any act, omission, or neglect of the ESCO and any employees, subcontractors and employees, agents, suppliers and invitees.

### **Performance and Evaluation Subsequent to Work**

#### 6.01 Workmanship and Equipment Warranty

ESCO hereby assigns to the Customer all warranties of all equipment and materials used in the Work. Attachment 5 lists equipment and material warranties, however, failure to include any equipment or materials having a warranty neither excludes said equipment or materials from the provisions of this section nor ESCO's responsibilities hereunder.

ESCO warrants that, for a period of one year from the date of the Certificate of Final Completion ("Warranty Period"), all equipment, materials and Work shall be free from defects in material, manufacture, workmanship and performance as set forth by the catalogs, bulletins and specifications included within ESCO's Response to the RFR or Technical Audit, whichever is appropriate. If such defect occurs within the Warranty Period, ESCO shall correct and pay for correction of all defects including replacement or repair and all parts and labor.

ESCO warrants that, for any equipment or materials used in the Work with a warranty period in excess of one year, ESCO shall correct all defects including replacement or repair provided that

ESCO's obligation is limited to the terms of the warranty and provided further that the Customer, by mutual consent with ESCO, may correct said defect.

No warranty liability shall attach to the ESCO until Work has been substantially completed and payment has been made. ESCO's warranties expressly exclude any remedy for damage or defect caused by abuse, improper operation, unapproved modifications or improper repairs not performed by ESCO.

If ESCO, upon written notice from the Customer, fails to correct defective equipment, materials or Work within a reasonable period of time, but no less than seventy two (72) hours, unless such defect is a condition deemed to endanger health or safety or is a fire hazard, Customer may correct any defect and ESCO shall reimburse Customer for its reasonable expenses incurred in performing such correction subject to any limitations contained within this section. Conditions which are deemed to endanger under the State Sanitary Code (105 CMR 410.000) or are fire hazards under Fire Prevention Regulations (527 CMR 1.00-50.00) shall be addressed promptly and jointly, if necessary, by ESCO and Customer assuring that immediate precautions are taken to avoid risk to persons or property, imminent measures are taken to prevent deterioration of condition, occupants are alerted to any dangers or hazards, and steps for final correction taken within twenty four (24) hours.

#### 6.02 Evaluation of Savings Achieved

The energy and water savings that occur after the Work shall be determined by the difference between actual consumption and baseline consumption as shown on Baseline Data and Projection (Attachment 6), as adjusted for occupancy, changes in the manner in which energy or water may be used other than manner of use which has been incorporated as part of the Work, and in the case of heating energy, substantial differences in heating degree days for the pertinent periods. ESCO shall monitor Customer's energy and water bills at properties subject to the Work for energy and water usage and shall report quarterly, within fifteen (15) business days after receiving bills for said period, comparing actual usage to the baseline and projections with detailed explanations of variations in savings, including shortfalls, to the Customer. The determination and evaluation of savings shall be consistent with procedures and methods described in the RFR and the Technical Audit.

ESCO shall prepare an annual report pursuant to 225 CMR 10.07 for submission to the Customer in a form suitable for review and **subsequent forwarding to the DOER.**

The Customer shall notify ESCO of substantive changes in the properties or the operation or occupancy thereof which could effect energy or water use. Such substantive change shall be incorporated in the determination and evaluation of savings.

The obligations under this Article are also described in the RFR and the ESCO's response thereto, and incorporated herein by reference as described in Section 9.13. ESCO shall be compensated at the rate of \_\_\_\_\_ dollars (\$\_\_\_\_\_) per quarter for monitoring and reporting services, payable no later than forty-five (45) days after receipt of the quarterly report as described above, provided such compensation shall be payable only if available from savings after any scheduled financing expenses or interest are paid.

### 6.03 Performance Guarantee

ESCO guarantees to the Customer the following:

- 1) Products provided by the ESCO meet or exceed the published catalog ratings and that these ratings were accurately used in the calculation of energy and water savings estimates,
- 2) Representations made concerning energy or water consumption in its estimates are accurate, and
- 3) Based on the projected use of energy and water for the equipment, conditions and operations in place at the time of completion of the Work, which the Customer and the ESCO have agreed to and documented in Baseline Data and Projection attached hereto as Attachment 6, the Customer will save at least \_\_\_\_\_ dollars (\$\_\_\_\_\_) per year, and/or \_\_\_\_\_ dollars (\$\_\_\_\_\_) during the term of this Contract.

### 6.04 Performance Remedies

ESCO shall be bound to both the annual and total guaranteed savings stated in this section. If, during the term of this Contract, the utility savings are less than the guaranteed amount, ESCO shall be required to implement one or more of the following remedies, such remedies to be at the sole and exclusive discretion of the Customer:

- 1) Within forty five (45) days after determination that actual savings are less than guaranteed, modify the installation at no cost to the Customer so that the guaranteed savings rate as projected in Attachment 6 is attained, and pay or credit, at the Customer's option, to the Customer an amount equal to the difference in the actual savings, if any, and the guaranteed savings, and/or
- 2) Pay or credit the Customer, at the Customer's option, an amount equal to the difference between the actual savings, if any, and the guaranteed savings, as projected in Attachment 6.

### 6.05 Security for Performance Guarantee

ESCO shall provide security for the guaranteed savings to the Customer in one or more of the following forms as mutually acceptable to ESCO and the Customer:

- 1) An efficiency bond, so called, prepaid and renewable annually in a face amount equal to the annual projected guaranteed savings, said bond to be placed with a regulated financial institution with a Best Rating of not less than A, or a comparable rating from a recognized financial rating firm,
- 2) Escrow account equal to the annual projected guaranteed savings, or
- 3) Letter of credit, prepaid for an amount equal to the annual projected guaranteed savings, from a regulated financial institution with a Best Rating of not less than A, or a comparable rating from a recognized financial rating firm.

The Customer may waive the security requirements herein provided:

- 1) The actual savings have met or exceeded projected savings for a period of not less than three years, and
- 2) The actual savings in the most current year exceed projected savings by not less than 50%, and
- 3) All Work and equipment are functioning as intended and no extraordinary shutdowns or replacements are anticipated, and
- 4) The financial condition of ESCO, as indicated by standard financial ratio tests applied to audited statements which include contingent liabilities for other Contracts of this kind, is at least as strong as the financial statement submitted with ESCO's Response to the RFR, and
- 5) The savings incurred as a result of this waiver inure to the benefit of the Customer, and
- 6) Said waiver may be cancelled by the Customer upon thirty (30) written notice to ESCO at which time ESCO shall provide security as required herein.

#### 6.06 Independent Audit

The Customer shall have the right to retain, at its own expense, an independent certified public accountant to complete and submit to the parties an audit of the calculations of Energy Cost Savings made pursuant to this Contract. Any audit so performed must use and incorporate the same methods, procedures, and assumptions as contained in this Contract and used by ESCO to perform the calculations undergoing an audit pursuant to this Section. Any payments between the parties necessary to resolve any irregularities identified in the audit shall be made within thirty days after submission of the audit to the parties. If, after thirty days, the parties are unable to agree upon the adjustment, the matter shall be submitted to resolution pursuant to Section 9.01, and the disputed portion of any additional payment due under this Section shall not be payable until the dispute resolution procedure required in Section 9.01 has been completed.

#### 6.06 Other Performance Terms and Conditions

All actions taken under Section 6, including but not limited to correction of warranties, remedy of performance shortfalls and maintenance of equipment by ESCO, shall conform with sections 5.02 through 5.16 inclusive. Other performance terms and conditions, if any, are described and incorporated herein as Other Performance Terms and Conditions on Attachment 7.

#### 6.07 Contract Closeout Responsibility

Prior to any final payment made pursuant to Section 4 and the termination of the Contract, ESCO shall perform a walk-through survey of the properties covered by this Contract and prepare an assessment of the condition of the equipment and materials installed as part of the Work and subsequent thereto under this Article. This closeout report shall include but not be limited to the following, as appropriate:

- 1) Operating and maintenance recommendations during the remaining life of equipment installed if different from requirements furnished upon installation or if changes in technology or procedures affecting the equipment could extend the useful life of the equipment or increase the conservation efficiency,
- 2) An overview of new technology or additional conservation measures for the Customer to consider.

## **7. Obligations of the Parties**

### **7.01 Obligations of the ESCO**

ESCO acknowledges and agrees that ESCO's obligations hereunder are in the capacity of providing professional services for the purposes described in the Preamble to this Contract and in said capacity is expected to provide energy and water auditing, engineering, design and monitoring services, construction management including general contracting as necessary, and other related services as solicited in the RFR and as may normally be incidental to these types of professional services. ESCO acknowledges and agrees that any other functions including but not limited to manufacturer's representative, dealer or distributor of equipment, materials or commodity specified herein or as subcontractor, or ownership in whole or in part or financially affiliated with a company which performs such other function shall constitute a conflict of interest which shall constitute a material breach of this Contract unless 1) fully disclosed in the ESCO's Response to the RFR, and 2) accepted by the Customer under terms which are specified in the Technical Audit. ESCO acknowledges and agrees that this paragraph applies to all its officers and employees.

The following events or conditions shall constitute a breach by the ESCO and shall give the Customer the right, without an election of remedies, to proceed pursuant to Section 9.01 and/or terminate this Contract by delivery of written notice declaring termination, upon which event the ESCO shall be liable to the Customer for any and all damages sustained by the Customer:

- 1) Any attempt by the ESCO to increase the Agreement price for reasons other than those related to changes in the Work pursuant to Section 5.03,
- 2) Any failure by the ESCO to provide quarterly monitoring reports pursuant to Section 6.02,
- 3) Any failure by the ESCO to remedy a shortfall in the guaranteed savings pursuant to Section 6.04,
- 4) Any representation or warranty furnished by the ESCO in ESCO's Response to the RFR, the Technical Audit or this Contract which is false or misleading in any material respect when made,
- 5) The filing of bankruptcy by the ESCO or by ESCO's creditors, an involuntary assignment for the benefit of creditors, or the liquidation of the ESCO,
- 6) Any failure by the ESCO to perform or comply with any other material term or condition of this Contract, including breach of any covenant contained herein, provided that such failure continues for thirty (30) days after written notice to ESCO demanding that such failure be cured or, if cure cannot be effected in thirty (30) days, the ESCO fails to begin to cure and proceed to completion thereof as quickly as is reasonably possible.

## 7.02 Obligations of the Customer

The Customer acknowledges and agrees that the implementation of the maximum conservation of energy and water practical within any pertinent regulatory, operational or physical constraints is of the essence to this Contract. Customer agrees to respond to all audits, proposed revisions and related requests on a timely basis for the expeditious design, implementation and monitoring of conservation measures.

Each of the following events or conditions shall constitute a breach by Customer and shall give the ESCO the right, without an election of remedies to proceed pursuant to Section 9.01 and terminate this Contract by delivery of written notice declaring termination, upon which event the Customer shall be liable to the ESCO for all Work furnished to date:

- 1) Any failure by the Customer, without cause, to authorize payment due more than forty-five (45) days after receipt of the invoice therefore,
- 2) Any representation by Customer in the RFR and this Contract is false or misleading in any material respect when made,
- 3) Any failure by the Customer to perform or comply with any other material term or condition of this Agreement, including breach of any covenant contained herein, provided that such failure continues for thirty (30) days after written notice to the Customer demanding that such failure be cured or, if cure cannot be effected in thirty (30) days, the Customer fails to begin to cure and proceed to completion thereof as quickly as is reasonably possible.

## **8. Insurance and Bond Requirements**

### 8.01 Worker's Compensation Insurance

ESCO shall provide during the life of this Contract Worker's Compensation Insurance in accordance with the Worker's Compensation Act of the Commonwealth of Massachusetts (M.G.L. c149 § 34A and M.G.L. c152) as follows:

Workers Compensation Coverage A	Statutory Minimum
Employer's Liability Coverage B	\$500,000 each accident \$500,000 disease per employee \$500,000 disease policy

### 8.02 Comprehensive General Liability

ESCO shall provide Comprehensive General Liability with the following minimum coverage with respect to the Work and other operations performed by ESCO and its employees, subcontractors, supplier's agents and invitees:

Bodily Injury and Property Damage	\$1,000,000 each occurrence, \$1,000,000 aggregate
Products & Completed Operations	\$1,000,000 aggregate
Personal & Advertising Injury	\$1,000,000 each occurrence



This policy shall include coverage relating to explosion, collapse, and underground property damage and contractual liability coverage. ESCO shall provide a separate "Owners and ESCO's Protective Liability" policy in the name of the Customer at the same limits listed above. The completed operations coverage shall be maintained for a period of two (2) years after Substantial Completion as defined in Attachment 3.

#### 8.03 Vehicle Liability

ESCO shall provide the following minimum coverage with respect to the operations of the any employee, including coverage for owned, non-owned, and hired vehicles:

Bodily Injury	\$1,000,000 each person
Property Damage	\$1,000,000 each accident
Combined Single Limit	\$1,000,000

#### 8.04 Property Coverage

ESCO shall provide the following coverage against loss or damage by fire and against loss or damage covered by the special perils insurance endorsement on all Work:

Special Perils	80% of Contract Price minimum
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Upon completion of Work at Customer buildings, ESCO shall provide an installation floater, in the full amount of the Contract Price, for the requirements set forth above. The policy or policies shall specifically state that they are for the benefit and payable to the Customer, the ESCO, and all persons furnishing labor or labor and materials for the Work, as their interests may appear.

#### 8.05 Customer as Additional Insured

The Customer shall be named as additional insured on the ESCO's Liability Policies.

#### 8.06 Certificates of Insurance, Policies

Certificates of insurance, acceptable to the Customer, shall be submitted to the Customer upon the execution of this Contract and shall be renewed upon expiration of the policies. Certificates shall indicate that the coverage required by section 8.01 through 8.05 is in effect. If the Customer is damaged by ESCO's failure to maintain such insurance, then ESCO shall be responsible for all reasonable costs or damages attributable thereto. Certificates shall note the thirty (30) day cancellation notice requirement of Section 8.07. All policies shall be issued by companies authorized to write that type of insurance under the laws of the Commonwealth of Massachusetts.

#### 8.07 Cancellation

Cancellation of any insurance required by this Contract, whether by the insurer or the insured, shall not be valid unless written notice thereof is given by the party proposing cancellation to the other party and the Customer at least thirty (30) days prior to the effective date thereof.

## 8.08 Bonds

ESCO shall provide the Customer with payment and performance bonds and efficiency bonds, so called, to cover the full term and value of the Contract and issued by a regulated financial institution with a Best Rating of not less than A, or a comparable rating from a recognized financial rating firm, as follows:

- 1) Performance and payment bonds shall secure 100% of the Contract Price (these bonds apply only to the Work to be performed, and do not cover any guaranteed savings), and
- 2) Efficiency bond, so called, shall be secured for 100% of the annual guaranteed savings and may be renewed annually, except as otherwise provided in Section 6.05.

## **9. General Provisions**

### 9.01 Dispute Resolution

Disputes regarding changes in and interpretations of the terms or scope of the Contract and denials of or failures to act upon claims for payment for extra work or materials shall be resolved according to the following procedures:

- 1) All claims by the ESCO shall be made in writing and submitted to the Customer for a written decision.
- 2) ESCO shall not delay, suspend, or curtail performance under the Contract as a result of any dispute subject to this section.
- 3) Within sixty days of submission of the dispute to the Customer, the Customer shall issue a written decision stating the reasons therefor, and shall notify the parties of their right of appeal under this section. If the official or his designee is unable to issue a decision within sixty days, he shall notify the parties to the dispute in writing of the reasons and of the date by which the decision shall issue.
- 4) Failure to issue a decision within one hundred and twenty-day period or within the additional period specified in such written notice shall give the petitioner the right to pursue any legal remedies available to him without further delay.

### 9.02 Conditions Beyond Control of the Parties

Except as otherwise provided herein, if either party shall be unable to carry out any material obligation under this Contract due to events beyond its control, such as acts of God, governmental or judicial Customer, insurrections, riots, extended labor disputes, fires, explosions or floods, this Contract shall remain in effect but the affected party's obligations shall be suspended until the uncontrollable event terminates or is resolved, unless the Contract is terminated by mutual consent, in which event, Customer shall pay ESCO for all parts of the Work furnished to the date of termination or as otherwise agreed.

### 9.03 Labor Laws

The ESCO shall obey and abide by all laws and regulations of the Commonwealth of Massachusetts relating to the employment of labor and public work.

ESCO shall comply with all federal and state laws, rules and regulations promoting fair employment practices or prohibiting employment discrimination and unfair labor practices. ESCO shall not discriminate in the delivery of services against any person who otherwise meets the eligibility criteria for services, or in the hiring of any applicant for employment nor shall any qualified employee be demoted, discharged or otherwise subject to discrimination in the tenure, position, promotional opportunities, wages, benefits or terms and conditions of their employment because of race, color, national origin, ancestry, age, sex, religion, disability, status as a Vietnam Era Veteran, sexual orientation or for exercising any rights or benefits afforded by law.

### 9.04 Prevailing Wage Rate

The [Division of Occupational Safety](#) has established a Schedule listing the prevailing minimum wage rates that must be paid to all workers employed on the Contract by either the ESCO or its subcontractors. Such Schedule shall continue to be the minimum rate of wages payable to workers on this Contract throughout the term of this Contract. The ESCO shall not have any claim for extra compensation from the Customer if the actual wages paid to employees on the Contract exceeds the rates listed on the Schedule. The ESCO shall cause a copy of the Schedule to be kept in a conspicuous place at the project site during the term of this Contract (see MGL c. 149 § 27). If reserve police officers are employed by the ESCO they shall be paid the prevailing wage rate of regular police officers (see MGL c. 149 § 34B).

### 9.05 Appropriations

- 1) *The Customer reasonably believes that funds can be obtained sufficient to make all payments due to ESCO under this Agreement.* The Customer hereby covenants that it will make reasonable and diligent efforts to obtain and maintain funds from which such payments may be made, including making provisions for such payments to the extent necessary in each annual or supplementary budget submitted for the purpose of obtaining funds, and using reasonable efforts to have such portion of the budget approved. Nothing herein shall obligate the Customer to institute legal action before any court, to commence proceedings before any forum, or to institute proceedings in the nature of mandamus against any public official in attempting to obtain said funds.
- 2) *In the event that the Customer is unable to obtain an appropriation of funds sufficient to discharge the Customer's obligations under this Agreement* **(insert language citing municipal contracting/appropriation authority. See M.G.L. chapter 44, section 31).**

### 9.06 Laws, Regulations, Ordinances and Standard Practices

ESCO shall perform its obligations hereunder in compliance with any and all applicable federal, state, and local laws, regulations, ordinances and by-laws, including applicable licensing and permitting requirements, in accordance with sound engineering and safety practices, and in compliance with any and all reasonable rules or policies of the Customer relative to the properties. ESCO shall be responsible for obtaining all governmental permits, licenses, consents, and authorizations as may be

required to perform its obligations hereunder (see also Section 5.10 regarding permits and fees pertaining to the Work).

#### 9.07 Patents and Patent Rights

The ESCO shall indemnify and hold harmless the Customer from all claims and actions by reason of any actual or asserted infringement upon patent rights in any equipment, material, or process used by ESCO in connection with this Contract.

#### 9.08 Access and Inspection

Customer shall have access to inspect, upon reasonable notice, the Work and the books, records, and other compilations of data which pertain to this Contract. Records shall be kept on a generally recognized accounting basis and calculations kept on file in legible form. Records shall be saved or archived for a period of three (3) years after the termination of this Contract and shall be kept or made available within Massachusetts.

ESCO shall have access, upon reasonable notice to the Customer, to inspect the property to assess the condition and operation of material and equipment installed.

#### 9.09 Ownership of Documents

All drawings, reports and other materials prepared by ESCO specifically in performance of this Contract shall become the property of the Customer as needed or upon the termination of the Contract.

#### 9.10 Certificates

ESCO certifies as follows:

- 1) Certificate of Authorization: If ESCO is a corporation, each person executing this Contract on behalf of the ESCO hereby covenants, represents and warrants that ESCO is a duly incorporated or duly qualified (if foreign) corporation and is authorized to do business in the Commonwealth of Massachusetts (a copy of evidence thereof to be supplied to the Customer upon request); and that each person executing this Contract on behalf of the ESCO is an officer of ESCO and that he or she is duly authorized to execute, acknowledge and deliver this Contract to the Customer, a copy of a corporate resolution to this effect is attached hereto as Attachment \_.
- 2) Tax Compliance Certification: Pursuant to M.G.L. c. 62C § 49A(b), each person signing this Contract on behalf of the ESCO hereby certifies, under the penalties of perjury, that to the best of his/her knowledge and belief, the ESCO has complied with any and all applicable state tax laws.
- 3) Certificate of Non-collusion: The undersigned certifies under penalties of perjury that this Contract has been made in good faith and without collusion or fraud with any other person. As used in this certification, the word "person" shall mean any natural person, business, partnership, corporation, union, committee, club, or other organization, entity of group of individuals.

- 4) Foreign Corporation: ESCO, if a foreign corporation, hereby certifies that it is in compliance with M.G.L. c. 181 § 4 and that the name and address of the resident agent is attached hereto with Exhibit \_.
- 5) Covenants: ESCO covenants that: (1) it presently has no financial interest and shall not acquire any such interest direct or indirect, which would conflict in any manner or degree with the performance of services required to be performed under this Contract or which would violate M.G.L. c. 268A, as amended from time-to-time, (2) in the performance of this Contract, no person having such an interest shall be employed by the ESCO, and, (3) no partner or employee of the ESCO is related by blood or marriage to any Commissioner or employee of the Customer. (Also see section 7.01)
- 6) Customer Certification: The Customer certifies that it is duly authorized to execute, acknowledge and deliver this Contract under the provisions of M.G.L. Chapter 25A § 11C or § 11I, to retain ESCO to design, acquire, install and assist in the maintenance of the installed equipment to accomplish the energy conservation measures and to provide other services, as more fully set forth herein, subject to all the terms and conditions of this Agreement.

#### 9.11 Assignment

ESCO shall not assign, transfer, convey, or otherwise dispose of this Agreement, or any part hereof, or his right, title or interest in the same or any part thereof, without the prior written consent of the Customer. ESCO shall not assign by power-of-attorney, or otherwise, any of the moneys due or to become due and payable under this Agreement, without the prior written consent of the Customer.

#### 9.12 Applicable Law and Severability

This Contract is made and shall be interpreted and enforced in accordance with the laws of the Commonwealth of Massachusetts. If any provision of this Contract shall be determined to be invalid or unenforceable under applicable law, such provision shall, insofar as possible, be construed or applied in such manner as will permit enforcement; otherwise this Contract shall be construed as if such provision had never been made part thereof.

#### 9.13 Complete Agreement

This Contract, together with any documents incorporated herein by attachment as an exhibit or by reference, shall constitute the entire and exclusive Contract between both parties and supersedes and terminates all prior or contemporaneous arrangements, understandings and agreements, whether oral or written, and this Contract may not be amended or modified except in writing and executed by the Customer and the ESCO. **The RFR and ESCO's Response thereto are incorporated by reference to the extent not superceded by the Technical Audit or this Contract.**

The failure of either the ESCO or the Customer to insist upon the strict performance of any term or condition hereof shall not constitute or be construed as a waiver or relinquishment of either party's right to thereafter enforce the same in accordance with this Contract.

#### 9.14 Further Documents

The parties shall timely execute and deliver all documents and perform all further acts that may be reasonably necessary to effectuate the provisions of this Contract.

#### **Contract Signatures**

IN WITNESS THEREOF, the parties have each caused this Agreement to be executed in triplicate on the dates set forth below (the last of which shall be considered the date of execution hereof) by their duly authorized representatives.

[ESCO]

[MUNICIPALITY]

Name \_\_\_\_\_

Name \_\_\_\_\_

By \_\_\_\_\_

By \_\_\_\_\_

Title \_\_\_\_\_

Title \_\_\_\_\_

Date \_\_\_\_\_

Date \_\_\_\_\_

[MUNICIPAL AGENCY]

Name \_\_\_\_\_

By \_\_\_\_\_

Title \_\_\_\_\_

Date \_\_\_\_\_

Approved as to Form:

\_\_\_\_\_  
Office of General Counsel

## **ATTACHMENT 1: DESCRIPTION OF THE PREMISES**

The project includes the following Premises:

The \_\_\_\_\_(Municipality and/or Municipal Agency) is located in \_\_\_\_\_, Massachusetts. The buildings to be addressed under this Agreement are:

**List Buildings here.**

◆

◆

◆

## **ATTACHMENT 2: PAYMENT SCHEDULE**



### **ATTACHMENT 3: CERTIFICATES**

- Application and Certification for Payment
- Certification of Substantial Completion
- Certificate of Final Completion

## **ATTACHMENT 4: TECHNICAL AUDIT (INCLUDING REVISIONS)**

## **ATTACHMENT 5: EQUIPMENT AND MATERIALS WARRANTIES**

## **ATTACHMENT 6: BASELINE DATA AND PROJECTIONS**

### **F-1: ENERGY BASELINE**

The energy baseline to be used to calculate monthly energy savings is attached hereto.

### **F-2: UTILITY RATE SCHEDULES**

The effective utility rate schedules to be used for calculating energy cost savings are attached hereto.

### **F-3: FLOOR AND CEILING PRICES FOR ENERGY AND WATER**

This is negotiable. Options vary from using a stipulated price to setting a percentage increase.

### **F-4: MONTHLY SAVINGS CALCULATION**

The purpose of the monthly savings calculation is to determine the change in overall energy cost that has resulted from the conservation program. In general, the cost of the current month's usage, at rates and unit costs currently in effect, will be subtracted from usage in the corresponding month in the base year projected to current conditions of occupancy and configuration, taken at the rates and unit costs that would have been in effect if the conservation program had not been initiated.

Each month, the energy savings will be calculated by comparing the current month's consumption with a projection of what would have been consumed if no conservation had been undertaken. The projection will be developed by applying correction factors to the base year usage to account for changes in weather (and other variables approved by all parties). The dollar savings will be based on current costs.

In cases where the conservation program does result in a change in energy source (conversion from electric to gas heat, for example), or where the level of usage changes enough to affect the marginal cost, the calculation procedure shall be modified accordingly so that it serves the purpose stated at the beginning of this Schedule.

Stated energy costs shall be considered the basis for all estimates, projections, and payment made pursuant to this Schedule. The price of all energy types and water shall not exceed the costs per unit detailed in the baseline data.

## **ATTACHMENT 7: BONDS**

Attached hereto are the payment, performance and efficiency guarantee bonds that ESCO will execute with the Customer to cover the Term and value of this Agreement.

## ATTACHMENT 7-1: PERFORMANCE BOND

It is hereby stated that \_\_\_\_\_ as principal, hereinafter called ESCO, and \_\_\_\_\_ as surety, are held firmly bound unto the \_\_\_\_\_ (Municipality), hereinafter called the Customer, in the sum of \_\_\_\_\_ lawful money of the United States of America, to be paid to the Customer, for which payments, well and truly to be made, we bind ourselves, our respective heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

WHEREAS, ESCO has by written agreement dated \_\_\_\_\_ entered into a contract with the Customer for the installation of certain Equipment as set forth on Attachment \_\_\_ of that Agreement, said Equipment to be located at \_\_\_\_\_.

WHEREAS, this bond applies only to the installation portion of the Agreement, and does not apply in any way to energy savings guarantees, payments or maintenance provisions. The installation portion of the Agreement is by reference made a part hereof.

NOW THEREFORE, the condition of this obligation is such that, if ESCO shall promptly and faithfully perform Equipment installation pursuant to the undertakings, covenants, agreements, terms and conditions of the Contract, and any extension thereof that may be granted by the Customer, with or without notice to the surety, and during the life of any guaranty required under the contract, and shall also well and truly keep and perform all the undertakings, covenants, agreements, terms and conditions of any and all duly authorized modifications, alterations, changes or additions to said contract that may hereafter be made, notice to the surety of such modifications, alterations, changes or additions being hereby waived, then this obligation shall become null and void; otherwise it shall remain in full force and virtue.

No right of action shall accrue upon or by reason hereof to, or for the use or benefit of anyone other than the named obligee.

No suit, action, or proceeding by the obligee to recover on this bond shall be sustained unless the Customer commences the same within two (2) years from the date of acceptance of the Equipment.

Whenever ESCO shall be, and declared by the Customer to be in default in relation to ESCO's obligations under the Agreement for Equipment installation, the Customer having performed the Customer's obligations thereunder, the Surety shall:

- 1) Arrange for ESCO, with the consent of the Customer, to perform and complete the construction Agreement, or;
- 2) Undertake to perform and complete the construction Agreement itself, through its agents or through independent ESCO's.

In witness whereof we hereunto set our hands and seals this \_\_\_\_ day of \_\_\_\_\_, AD 20\_\_\_\_.

\_\_\_\_\_  
(Print Name of General Contractor) (Seal)

\_\_\_\_\_  
(Print Name of Surety) (Seal)

By \_\_\_\_\_  
(Signature-Title)

By \_\_\_\_\_

Surety Agent: \_\_\_\_\_

Countersigned By: \_\_\_\_\_

Agent Address: \_\_\_\_\_

Mass. Resident Agent: \_\_\_\_\_

Telephone Number: \_\_\_\_\_

Address: \_\_\_\_\_

**Power of Attorney must be attached.**

Telephone Number: \_\_\_\_\_

## ATTACHMENT 7-2: PAYMENT BOND

It is hereby stated that \_\_\_\_\_ as principal, and \_\_\_\_\_ as surety, are held and firmly bound unto the \_\_\_\_\_ (Municipality), hereinafter referred to as the Customer, in the sum \$ \_\_\_\_\_ lawful money of the United States of America, to be paid to the Customer, for which payments, well and truly to be made, we bind ourselves, our respective heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

Whereas, the said principal has made a contract with the Customer, acting through the Customer bearing date of \_\_\_\_\_, 20, for the installation of \_\_\_\_\_.

Now the conditions of this obligation is such that if the principal shall pay for all labor performed or furnished and for all materials used or employed in said contract and in any and all duly authorized modifications, alterations, extensions of time, changes or additions to said contract that may hereafter be made, notice to the surety of such modifications, alterations, extensions of time, changes or additions being hereby waived, the foregoing to include any other purposes or items set out in, and to be subject to, provisions of Massachusetts General Laws, Chapter 40, section 39A (Water supply or distributing system; establishment; maintenance and operation; exception), and Chapter 149, section 29 (Bonds for payment for labor, materials, rentals or transportation charges; enforcement of claim; notice of claim; speedy trial, appeal, consolidation; dismissal; legal fees; posting statute), as amended, then this obligation shall become null and void; otherwise it shall remain in full force and virtue.

In witness whereof we hereunto set our hands and seals this \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

By \_\_\_\_\_ (Seal) Principal

By \_\_\_\_\_ (Seal) Surety

Address \_\_\_\_\_

\_\_\_\_\_

Surety Agent \_\_\_\_\_

Address \_\_\_\_\_

Telephone Number \_\_\_\_\_

**Power of Attorney must be attached**

### ATTACHMENT 7-3: EFFICIENCY GUARANTY BOND

It is hereby stated that we, \_\_\_\_\_ hereinafter called ESCO, and \_\_\_\_\_ as surety, hereinafter called Surety, are subject to the terms and conditions of this bond, held and firmly bounded unto the \_\_\_\_\_. (Municipality), hereinafter referred to as the Customer, as obligee, in an amount not to exceed \_\_\_\_\_ dollars (\$ \_\_\_\_\_) for the payment whereof ESCO and Surety bind themselves, their heirs, executors, administrators, successors and assigns jointly and severally, firmly by these presents.

Whereas, ESCO has by written agreement dated \_\_\_\_\_ entered into an Energy Performance Contract, hereinafter referred to as the Agreement, with the Customer for the procurement of energy management services pursuant to which ESCO has guaranteed to the Customer that certain adjusted energy costs savings will be achieved from the services of ESCO during certain years specified in the Agreement, which Agreement is by reference made a part hereof and incorporated herein by reference, and in relation to which Agreement all terms and definitions contained herein shall carry the same meaning as established in the Agreement, except that the term of this bond shall be for \_\_\_\_\_ (enter number of years).

Now therefore, the conditions of this obligation are as follows:

- 1) This obligation shall be for a term of \_\_\_\_\_ (enter number of years) commencing \_\_\_\_\_ and ending \_\_\_\_\_ and shall be limited to not more than the savings percentage then applicable under the Agreement applied against the Dollar estimate of Guaranteed Savings designated for the year noted herein.
- 2) Should ESCO fail to achieve the dollar estimate or Guaranteed Savings as noted in Contract, ESCO shall be obligated to pay to the Customer an amount which shall equal (a) the difference between the dollar estimate of guaranteed savings for (enter year) or (enter year) and the actual savings for the (enter year) or (enter year), multiplied by (b) the then applicable Savings Percentage noted in the Agreement. Should ESCO fail to pay a valid claim, the Surety shall become obligated to pay such claim, not-to-exceed the penal sum of the bond.
- 3) Should ESCO achieve or exceed the dollar estimate of guaranteed Savings for years (enter year) or (enter year), as noted in the Contract, then this obligation shall become null and void, and Surety shall be released from any and all liabilities and obligations to the Customer for the performance of ESCO under the Agreement for \_\_\_\_\_ (enter years) years.
- 4.) Calculations of adjusted energy cost savings achieved by ESCO in determination of ESCO's performance in relation to the achieving of such adjusted energy costs savings shall be performed pursuant to and shall be governed by the applicable terms and conditions of the Agreement.

In no event will the Surety's obligation under this bond exceed the penal sum of this bond.

The Surety at its option on the termination of this bond, may issue a superseding bond for a period of no less than \_\_\_\_\_ (enter years) years provided such superseding bond shall include the amount of now liquidated benefits under this obligation. It is understood and agreed that any such additional bond shall supersede and exonerate this bond.

Signed and sealed this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_

Principal \_\_\_\_\_

By Surety \_\_\_\_\_

By Attorney-in-Fact \_\_\_\_\_

**Power of Attorney must be attached.**